United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1646 75-7699

To be argued by
DENNIS R. YEAGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

75-7699, 76-7011

B

GEORGE RIOS, *et al.*,
Plaintiffs-Appellees-Appellants,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellants-Appellees.

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS, GEORGE RIOS, *ET AL.*

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UNITED STATES COURT OF APPEALS
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1. The District Court Erred in Not Assessing Attorneys Fees Against MCA and JAC

A. The Applicable Standard

Both MCA and the JAC attempt to support the district court's failure to hold them liable for attorneys fees by emphasizing the supposed breadth of the court's discretion in the matter. (Brief of Defendant-Appellee Mechanical Contractors Association of New York, Inc. [hereafter "MCA Brief"] at 6-8; Brief of Defendant-Appellee Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund [hereafter "JAC Brief"] at 6-8)* It is conceded by the parties, however, that under §706(k) of Title VII, 42 U.S.C. §2000e-5(k), the district court's exercise of discretion must be governed by the principle that successful plaintiffs are to be "awarded attorneys' fees in all but very unusual circumstances." Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); see Northcross v. Board of Education of Memphis City Schools, 412 U.S. 427, 428 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S.

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* Hereafter references to the briefs of the other parties in this appeal will be as follows:

- Brief of Defendant-Appellant-Appellee Enterprise Association Steamfitters Local 638 of U.A. - "Union Brief"
- Reply Brief of Defendant-Appellant-Appellee Enterprise Association Steamfitters Local 638 of U.A. - "Union Reply Brief"
- Brief of Plaintiffs-Appellees-Appellants George Rios, et al. on Attorneys Fees - "Rios Brief"
- Reply Brief of Plaintiffs-Appellants George Rios, et al on Back Pay - "Rios Back Pay Reply Brief"

400, 402 (1968). (MCA Brief at 6; JAC Brief at 6)*

However, having acknowledged the governing principle and the further caveat of Moody that "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles," 422 U.S. at 416, the arguments of the MCA and the JAC nevertheless proceed as though neither principle applied. Their arguments rely basically on appeals to the breadth of the lower court's discretion but do not respond to the question of whether the particular grounds of the district court's decision can constitute the "very unusual circumstances" for denying attorneys' fees.** In addition, MCA and JAC suggest other grounds which they urge support the lower court's action, although the lower court did not credit these other grounds, and they merit no more

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* The Union also concedes the applicability of this standard (Union Brief at 10), but attempts to draw some support for its arguments from Fort v. White, ___ F.2d ___, No. 75-7407, slip op. 1789 (2d Cir. Feb. 9, 1976), in which this Court held a different standard to apply to the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq. The inapplicability of the holding to Title VII of the 1964 Act is apparent and is discussed further at pp.17-19, below.

** See MCA Brief at 7, JAC Brief at 7-8 and cases cited therein, all of which were decided prior to Moody.

credit on this appeal.* In this strategy MCA and JAC are without alternatives since the district court's exercise of discretion was clearly contrary to established precedent and "sound legal principles" of Title VII.

B. The MCA is Liable for Attorneys Fees

The district court held MCA not liable for attorneys fees because "no specific instances of MCA discrimination" had been shown (A-1017), a ground which MCA couples with the contention that the court's injunction as to MCA was only for the purpose of granting relief among the parties in accordance with Rule 19(a)(1) of the Federal Rules of Civil Procedure, and that the Rios plaintiffs therefore were not a "prevailing party" against MCA within the meaning of 42 U.S.C. §2000e-5(k).

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* See Franks v. Bowman Transportation Co., ___ U.S. ___, 44 U.S.L.W. 4356, 4364 (U.S. March 24, 1976) (No. 74-728):

> "We reject this argument for two reasons. First, the District Court made no mention of such considerations in its order denying the seniority relief. As we noted in Albemarle Paper, supra, at 421 n. 14, if the District Court declines due to the peculiar circumstances of the particular case to award relief generally appropriate under Title VII, '[i]t is necessary . . . that . . . it carefully articulate its reasons' for so doing."

(MCA Brief at 3) Denial of attorneys fees in the circumstances of this case for lack of "specific instances of MCA discrimination" evinces a clearly erroneous legal standard. MCA's contention as to the nature of the court's injunction is equally erroneous.

The extent of the injunctive relief ordered against MCA has already been documented (see Rios Brief at 12-14), based on the district court's findings of MCA's involvement in the discriminatory practices in the steamfitting industry. And MCA was subjected to the district court's decree not as MCA claims, solely for the purpose of granting relief among the parties in accordance with Rule 19(a)(1) of the Federal Rules of Civil Procedure, but because of the responsibility which it shared for the discrimination. The district court found that "MCA has greater influence over and responsibility for employment practices applying to the industry as a whole than any single employer." (A-616) The court further found that "[w]hile there is no evidence that either Local 638 or MCA has engaged in purposeful discrimination against nonwhites, the conditions of the industry set forth above, in combination with the history of discrimination in admissions to the A Branch of Local 638, give whites advantages in obtaining employment. The result is the preservation of the effects of past discrimination." (A-602-03) Certainly, nowhere in its post-trial order

(A-566-79) or its attorneys fees opinion (A-1011-20) or order (A-1033-34) does the district court indicate that the relief awarded against MCA was solely for purposes of Rule 19(a)(1).* While the court was highly charitable in not charging any party with intentional discrimination, this approach should not be taken as a finding of no responsibility. The court noted in a post-trial conference, speaking of its proposed opinion:

> "I have the impression, I think I get that from [the MCA's attorney], that he is a little fearful that I am going to castigate MCA, and I think as I have tried to make clear throughout our meetings, it is not my purpose to castigate anyone. I think we have an industry problem where the industry has failed, and I suppose everybody involved in the industry bears some responsibility for that, and I take it my job, with your help, is to start off on a new tack and see that we don't do it any more. That is what my purpose will be in this memorandum." Index to Record on Appeal, Document 38, pp. 2-3**, Conference of June 1, 1973.

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* Indeed, under 42 U.S.C. §2000e-5(g), an injunction of the nature imposed on the MCA could have been issued only on the court's "find[ing] that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice."

** Hereafter references to documents not in the Appendix and assigned a document number in the Index to the Record on Appeal will be in the form "Doc. ___." Reference to Plaintiffs' Exhibits admitted into evidence in the district court will be in the form "Ex. ___."

Even if the MCA had only acquiesced in the industry-wide employment discrimination which resulted from the Union's active discriminatory practices, MCA, which more than any single employer had "influence over and responsibility for employment practices applying to the industry as a whole"(A-616), is equally liable for the pervasive discrimination and for the attorneys' fees of plaintiffs who successfully challenged and corrected the pattern of discrimination. See, e.g., Patterson v. American Tobacco Co., ___ F.Supp. ___, 9 E.P.D. ¶9909 at 6781 (E.D. Va. 1974), ¶10,039 at 7288 (E.D. Va. 1975), aff'd in part, modified in part, and remanded on other grounds, ___ F.2d ___, 11 E.P.D. ¶10,728 (4th Cir. 1976); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1379 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 799, 804 (4th Cir.), petition for cert. dismissed, 404 U.S. 1006 (1971); cf., Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1263, 1269 (5th Cir. 1975), petition for cert. filed sub nom. Teamsters, Local 988 v. Sabala, 44 U.S.L.W. 3384 (U.S. December 1, 1975 (No. 75-781)).

Moreover, the absence of specific instances of MCA discrimination does not mitigate the finding that the industry practices discriminated against non-whites as a class, or MCA's liability for corrective action under the injunction issued by the district court on behalf of the class as a whole. No different standard should be applied to MCA's

liability for attorneys fees incurred in obtaining that result. See, e.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) (Attorneys fees awarded where plaintiff prevailed on behalf of the class although the named plaintiff's specific claim of discrimination was not proven).

Finally MCA jointly controlled the JAC apprenticeship program and should be jointly liable with the Union for attorneys fees awarded against the JAC. See pp. 7-10 and 11, below.*

C. The JAC is Liable for Attorneys Fees

No where in its Brief does the JAC respond to the cases cited by plaintiffs (Rios Brief at 17-20) which demonstrate the error in the reasoning of the district court in absolving the JAC from liability on the grounds that it did not intentionally discriminate and acted in good faith (A-1017). Nor does the JAC cite any

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* MCA also argues that an award of attorneys fees is precluded by the circumstance of plaintiffs' representation by attorneys employed by a non-profit organization which receives federal funds. The argument is discussed at pp. 15-26, below.

authority for denying attorneys' fees on these grounds.* Unable to respond to those cases which show good faith is irrelevant to an award of fees, the JAC nonetheless attempts to convince this Court that it acted in good faith (JAC Brief at 3-4) and that the JAC program was in substantial compliance with Title VII (JAC Brief at 4-5). Plaintiffs have already demonstrated that the JAC claims to good faith are not only legally irrelevant, but also without support in the record (Rios Brief at 18-19). And if the district court had felt that the apprenticeship program was in substantial compliance with Title VII, it would not have been possible or necessary for it to enjoin the JAC from discrimination (A-567-68), and, pending the achievement of the percentage goal, to reduce the length of the program to four years (A-570), alter the age requirement (A-571), limit the inquiry into an applicant's criminal record (A-571), retain the high school requirement only so long as there were a sufficient number of non-white applicants possessing a high school

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* In none of the cases cited by the JAC as support for the district court's decision (JAC Brief at 8), Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364 (5th Cir. 1974); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F.Supp. 1357 (D. Kan. 1971), did the courts deny attorneys fees on the grounds of good faith or lack of purposeful discrimination.

diploma to meet the goal (A-1211), make appointments from separate lists because of low scores achieved by black and Spanish-surnamed applicants on the new test and oral interview (A-1211-12), order that in 1973, 175 of the 400 apprentices to be indentured had to be non-white (A-575), and require that at least 30% of those indentured in each year from 1974-1977 be non-white (A-570).

The JAC attempts to find an additional ground not credited by the district court to support its non-liability for attorneys fees. It argues that the court "no doubt" considered the JAC financial responsibilities under the Affirmative Action Plan "so important that the JAC should not be crippled by imposition of any liability for attorneys' fees." (JAC Brief at 9).* This argument is without support in the record. Moreover, this attempt to support the district

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* Cases cited by the JAC for the so-called "frustration of purpose" concept are inapposite. (JAC Brief at 9-10) In Chastang v. Flynn and Emrich Co., 381 F.Supp. 1348 (D. Md. 1974) the court denied attorneys fees to plaintiffs who had sued to recover money in a retirement fund to which they were individually entitled. As the terms of the fund had been amended prior to their suit, they did not seek injunctive relief on behalf of the other members of the fund, who, the court found, should not have to pay for their attorneys fees. United States v. Wood, Wire & Metal Lathers, Local 46, 328 F.Supp. 429, 442 (S.D.N.Y. 1971) did not involve the issue of attorneys fees, but an item of costs which the court found the sovereign, given its public role, could afford to share.

court's erroneous denial of fees as to JAC should be rejected in light of the Supreme Court's recent ruling in Franks v. Bowman Transportation Co., ___ U.S. ___, 44 U.S.L.W. 4356, 4364 (U.S. March 24, 1976) (No. 74-728)

> "We reject this argument for two reasons. First, the District Court made no mention of such considerations in its order denying the seniority relief. As we noted in Albemarle Paper, supra, at 421 n. 14, if the District Court declines due to the peculiar circumstances of the particular case to award relief generally appropriate under Title VII, '[i]t is necessary ... that ... it carefully articulate its reasons' for so doing." (emphasis added)

Attorneys fees, too, are generally appropriate" under Title VII and, therefore, this reasoning is equally applicable in the context of an award of attorneys fees. Where the district court's denial of fees must be based on "very unusual circumstances," Moody, supra 422 U.S. at 415, such circumstances must be articulated for the reviewing court. This attempt to rest the district court's decision on a ground which it did not mention or credit should therefore be rejected.

2. MCA and the Union Are Liable for Attorneys Fees Assessed Against the JAC

Contrary to the Union's assertion (Union Reply Brief at 13), the Union and MCA are responsible for the discriminatory acts of the JAC and consequently for its liability for attorneys fees, since both the Union and MCA appointed the trustees of the Steamfitters Industry Educational Fund (A-589), appointed the members of the JAC (A-773), and exercised effective control over the general policy determinations and day-to-day operations of the JAC. The joint control of the JAC by MCA and the Union is fully discussed and documented in the Rios Back Pay Reply Brief at 4a-8.**

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* In brief, MCA and the Union are equally represented on the JAC which administers the industry's apprenticeship program (A-614). All matters regarding requirements for and content of the apprenticeship program were "committed solely" to the JAC and did not require trustee approval (Deposition of Joseph V. Hopkins, Ex. 169, p. 47) MCA representatives speak for and implement the policy of the MCA at JAC meetings (A-493-94). Union representatives on the JAC included the Union's principal officers (A-1192); JAC Answers to Interrogatories, Doc. 24, p. 2; Ex. 101, JAC Minutes of September 22, 1967 p. 2). Some matters, such as the number of apprentices to be indentured were negotiated between the Union and MCA through both their collective bargaining representatives (A-181) and their representatives on the JAC (Ex. 101 JAC Minutes of August 7, 1969, p. 3; JAC Minutes of November 13, 1969, p. 3).

3. The Union Is Fully Liable for the Amount of Attorneys Fees Requested

The district court gave as its reason for not awarding against the Union the full amount of attorneys fees to which it found plaintiffs otherwise entitled, the fact that the Union is not a profit-making institution able to pass the cost onto customers, but an association of steamfitters supported by dues and other assessments from its members. (A-1016) The impropriety of the reduction on this ground is discussed in the initial Rios Brief at 21-28. In reply the Union argues that the Union members should not have to bear such costs through their dues and assessments (Union Reply Brief at 13-14), and that the Union's ability to pay is a permissible ground for the reduction of the award, (Union Reply Brief at 14-15) The equity of a union's being required to bear, to the same extent as any other violator of the law, the costs necessary to compensate for its discriminatory practices is fully discussed in the Rios Back Pay Reply Brief and applies equally to the costs of attorneys fees. To avoid repetition counsel requests that reference be made to pp. 13-18 of that brief.

As to the financial condition of the Union, for which the record contains no evidence, the Union has failed

to find authority for reduction of attorneys fees on any such basis; suggested no reason why such a consideration, if permissible, is not recognized in the cases (see Rios Brief at 24-26); and offered no reason why, if some consideration of p[illegible]en financial condition is warranted, a system of installment payments can not furnish a complete and fair accommodation.

The cases cited by the Union do not support its argument. The Union cites Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974) as supporting its claim that "the ability of the Union to pay is a highly relevant consideration." (Union Brief at 14-15) Yet Van Hoomissen deals with ability to pay only to the extent of rejecting the Xerox Corporation's obvious ability to pay its own counsel as a ground for denying attorneys fees to Xerox under 42 U.S.C. §2000e-5(k), 503 F.2d at 1133, where it "prevailed" in part against the EEOC's motion to intervene in a case in which Xerox was a defendant. In sum, the case rejects the Union's contention. The other cases which the Union cites are not relevant. Thornton v. East Texas Motor Freight, 497 F.2d 416, 421-22 (6th Cir. 1974) and United States v. Georgia Power Co., 474 F.2d 906, 919-22 (5th Cir. 1973) concern the discretion the district court has in fashioning a back pay award. And the only discussion of attorneys fees in Laffey v. Northeast Airlines, Inc., 374 F.Supp. 1382, 1389-90 (D.D.C. 1974) is the court's statement that the

parties should agree upon a reasonable amount within ninety days otherwise the court would fix the amount of the fee. Thus, none of the cases cited by the Union bear upon the issue of ability to pay as a consideration in determining the amount of attorneys fees awarded, except for Van Hoomissen and that supports disregarding a party's ability to pay.

4. Plaintiffs Are Not Precluded from an Award of Attorneys Fees Because the National Employment Law Project, Inc. Is a Non-Profit Corporation Which Receives Federal Funds

A. The Statutory Purpose of Title VII Is Furthered by an Award of Fees in This Case

The Union, the MCA, and the JAC each oppose the award of any attorneys fees, or in the alternative, the award of the full amount which the district court found otherwise appropriate (A-1017), on the ground that plaintiffs' counsel were provided free of charge to plaintiffs by a non-profit organization which receives funds from the federal government. (Union Reply Brief at 8, 10; MCA Brief at 11-14; JAC Brief at 11-15).

The attorneys fees provision of Title VII of the Civil Rights Act of 1964, like that of Title II of the Act, represents a determination "that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorney fees in all but very unusual circumstances." Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1974). Since the brunt of the expense of such actions has been borne largely by non-profit organizations which operate on such funds as they can gather, provide legal counsel without charge and receive reimbursement only through court awarded fees, if these circumstances are held to be the "very unusual" ones contemplated by Moody and Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), the organizations' ability to provide, and the ability of an aggrieved individual to obtain counsel to enforce this "great public interest" will be

drastically reduced. Similarly, if the attorney's time and effort in enforcing the public interest in civil rights actions is viewed as somehow less valuable than the efforts of counsel in commercial cases of comparable scale and complexity, there will be fewer lawyers willing to undertake such cases, and the enforcement of individual rights as well as the public interest will continue to depend on the limited resources of non-profit organizations. Neither result will serve the over-all purposes of Title VII, and either will erode the efficacy of the attorneys fee provision as a means of achieving those purposes.

The fact that the plaintiffs are not obligated to pay fees to their attorneys (MCA Brief at 12-13) has no bearing on the award, as the decisions on this point have recognized (see Rios Brief at 30-31). In many cases members of the groups protected by Title VII are simply not in a position to incur the obligation of payment of any attorneys fees, much less an amount representing the reasonable value of the lawyer's services in prosecuting a complex action. Additionally, members of the class on whose behalf the action is also prosecuted are never obligated to pay for the services. Conditioning the award in any way on the plaintiff's obligation to pay would reduce the availability of counsel in Title VII cases, and class action enforcement in particular, not only as to legal services provided by non-profit organizations, but also as to services of individual attorneys who might

otherwise undertake representation without charge on the condition of receiving only such fees as the court may award.

Fort v. White, ___ F.2d ___, No. 75-7407, slip op, 1789 (2d Cir. Feb. 9, 1976), cited in the Union's Reply Brief at 6-7, does not support denial of an award in a Title VII case when the plaintiffs are not obligated to pay attorneys fees, or depart from the decisions which have held this circumstance irrelevant to an award under the standard applicable to Title VII, Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975), as well as Title II of the Civil Rights Act of 1964, Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), and Title VII of the Emergency School Act of 1972, Northcross v. Board of Education, 412 U.S. 427 (1973). The Court in Fort simply determined that this standard, by which the prevailing party routinely was to be awarded attorneys fees in all but unusual circumstances, did not apply to actions under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 et seq. (Slip op. at 1797). The Court noted that the relevant language of the Fair Housing Act which placed limitations on an award of fees not found in the statutes construed in Newman and Northcross suggested that a routine award was not to be made. Fort v. White, supra, slip op. at 1796. In contrast to the Fair Housing Act, the attorneys fee provision of Title VII of the Civil Rights Act of 1964 is virtually identical to that of the statutes construed in Newman and North-

cross,* and has been held to be governed by the same standard.

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* Compare Section 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b):

> "In any action commenced pursuant to this subchapter, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." (emphasis added)

and

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k):

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

and

Section 718 of Title VII of the Emergency Act of 1972, 20 U.S.C. §1617:

> "The court, [in its discretion], upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs." (emphasis added)

with

Section 812(c) of the Civil Rights Act of 1968, 42 U.S.C. §3612(c) interpreted in Fort v. White, supra:

> "The Court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, that the said plaintiff in the opinion of the courts is not financially able to assume said attorney's fees."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).*

The fact that the plaintiffs' attorneys are salaried by the organization and thus, in defendants' view, take no personal risk in undertaking the representation (MCA Brief at 13; JAC Brief at 13), is not relevant. The same may be said of representation by salaried associates of private firms. In either case the financial risk is borne not by the attorney of record but by the organization with which he is associated, be it a partnership, professional corporation, or not-for-profit corporation.

Nor is there a basis for discriminating in statutory attorneys fees awards against organizations which undertake to provide representation out of concern for the vindication of the rights involved rather than for profit. The resources of non-profit organizations, regardless of where they manage to obtain funds, are limited. The allocation

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* Accord Rosenfeld v. Southern Pacific Ry. Co., 519 F.2d 527 (9th Cir. 1975); Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), petition for cert. dismissed, 404 U.S. 1006 (1971); Lea v. Cone Mills, 438 F.2d 86 (4th Cir. 1971); Clark v. American Marine Corp., 320 F.Supp. 709, 711 (E.D. La. 1970), aff'd on opinion below, 437 F.2d 959 (5th Cir. 1971).

of those resources to one matter necessarily requires deferral of another. The expenditure involved is final and, unless fees are awarded, unrecoupable. As the cases have recognized (see Rios Brief at 31, 35, 36), the organization's ability to replenish its capital, whether through private or governmental philanthropy, is never certain, and far less so than the ability of a commercial firm to recoup its losses through other fee producing activity.* To the extent that the non-profit organization does manage to

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* The Union argues (Union's Reply Brief at 8) that since the Project receives funds from OEO (now from the Legal Service Corporation) and E.E.O.C., and since those agencies are allotted funds by Congressional appropriation, an award of attorneys fees would amount to judicial enlargement on a Congressional determination of the appropriate amount and use of funds. Even indulging the Union's assumptions as to Congressional awareness of the funds received by the Project, it is absurd to suggest that the amount of an appropriation represents a Congressional determination of the maximum extent to which the laws should be enforced or the rights of protected classes vindicated, rather than a practical limitation imposed by the amount of available revenues. And indeed, as the Supreme Court determined in Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240, 262-63, n. 36 (1975), there was no Congressional intent in the Legal Services Corporation Act of 1974, 42 U.S.C. §2996, et seq., to restrict the recovery of attorneys' fees by recipients of the Corporation's funds "where under the circumstances other plaintiffs would be awarded such fees."

survive independent of court awarded fees, there is no reason why its fund-raising efforts should accrue to the benefit of the violators of the law, by denial or reduction of attorneys fees in one case, rather than to the benefit of individuals in other cases whose rights the organization is devoted to vindicating. In circumstances where a commercial firm would be fully compensated for its services without regard to its other sources of income, there is no legal or equitable ground for treating differently a non-profit organization. Thus, this Court in Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974), rejected the contention that attorneys fees were not warranted because one of the firms representing the plaintiffs therein was a non-profit organization. 496 F.2d at 649.*

The sources from which the organization has obtained funds, whether governmental or private, do not alter the equities. While the non-profit organization's chosen mission may be the protection of certain rights or

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* The Union attempts to deal with this holding by characterizing it as dictum (Union Reply Brief at 5), which it clearly is not. The defendant's contention therein was, as the Court noted, "renewed on appeal" and rejected by the Court along with other contentions as "unimpressive." 496 F.2d at 649. The fact that the Court did not find the matter worth further discussion or evince any concern with the source of the organization's funds, does not detract from the authority of the disposition.

classes,* the enforcement of the law is not, as defendants suggest, its duty or responsibility in any sense comparable to that of a governmental agency. That an organization may obtain funds through grant or contract with federal agencies for the purpose of aiding the implementation of its objectives does not distinguish it in any material way from an organization which receives funds for the same purpose from private sources. Thus, the courts have awarded or approved in principle awards to non-profit organizations receiving governmental funds as well as to organizations receiving private funds.**

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* In the case of the National Employment Law Project, Inc., its resources are devoted to employment problems of the poor generally, including problems of racial discrimination as well as unemployment insurance, welfare work rules, and other matters.

** The Union's Reply Brief, p. 6, incorrectly suggests that the Supreme Court's rejection in Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1970), of any doctrinal basis for awards of any fees to any counsel other than where authorized by statute or traditional equitable doctrine, undermines the authority of decisions which, in approving awards to organizations receiving federal as well as private funds, may have based the authority for any award on the doctrine rejected in Alyeska.

If, on the other hand, the Union's point is that such non-statutory awards, or awards under statutes other than Title VII, to organizations receiving federal funds, do not involve explicit restrictions on awards to the government, the Union overlooks the general restriction to this effect in 28 U.S.C. §2412.

(See Rios Brief at 31-34, and, in addition, Rodriguez v. Trainor, 67 F.R.D. 437, 439 (N.D. Ill. 1975) (award appropriate to counsel employed by federally funded legal services office)). As another court has held:

> "Defendants' contention that plaintiffs should not be awarded fees because they are funded to do the work they do has been rebuffed too many times to justify its being raised again here." (footnote omitted)
> Chance v. Board of Examiners, ___ F.Supp. ___, 11 E.P.D. ¶10,631 at p. 6648 (S.D.N.Y. 1975), reconsidered and adhered to, ___ F.Supp. ___, 11 E.P.D. ¶10,721 (1976).

B. Plaintiffs Are Not Precluded From an Award of Fees by the Language of 42 U.S.C. §2000e-5(k) of Title VII

Under Title VII the E.E.O.C. and the United States, through the Attorney General, are vested with various responsibilities and authority which a private litigant clearly does not possess, regardless of the attorneys representing him or the funding sources of the private organization which provides those attorneys.* Such litigants do not

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* The Act established the United States Equal Employment Opportunity Commission which was authorized to investigate and conciliate complaints, and, after 1972 to bring civil actions against persons on behalf of aggrieved individuals. 42 U.S.C. §2000e-5(b),(f)(1). In addition, the United States, through office of the United States Attorney General, was empowered to bring civil actions against certain governmental defendants, 42 U.S.C. §2000e-5(f)(1), file suit where it had reasonable cause to believe that a "pattern and practice" of

(cont'd on following page)

assume the prerogatives or authority of the Commission or the United States under other provisions of Title VII, and similarly cannot reasonably be construed as the "Commission" or the "United States" within the meaning of the attorneys fee provision, 42 U.S.C. §2000e-5(k). Awards to litigants represented by counsel from organizations which receive federal funds clearly accords with the purposes of the attorneys fee provision (see pp. 15-23, supra), and is in no sense a circumvention of the restriction on awards to the Commission or the United States when either is the prevailing "party." Awards to counsel from such organizations are common in numerous contexts (see Rios Brief at 39), and have not been viewed as violative of the restriction on attorneys fees to the government provided in 42 U.S.C. §2000e-5(k), or of the general restrictions to the same effect provided in 28 U.S.C. §2412, which applies to the United States as the prevailing party in any context.

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discrimination existed, 42 U.S.C. §2000e-6, and request that a three judge court be convened to hear and determine cases of general public importance. 42 U.S.C. §2000e-6.

Private litigants must file charges with local fair employment agencies and the EEOC within a limited period of time after the date of the discriminatory act, 42 U.S.C. §2000e-5(e), or their claim is lost. They must generally wait until 180 days after the EEOC has assumed jurisdiction,or the charge is dismissed by the EEOC,before they may file a civil action, 42 U.S.C. §2000e-5(f)(1). And they must file suit within 90 days after the occurrence of certain events in the administrative process, 42 U.S.C. §2000e-5(f)(1).

The National Employment Law Project, Inc. is a not-for-profit corporation organized under the laws of the State of New York, and approved to engage in the practice of law by an order of the Appellate Division, First Department. It may receive funds from public and private sources and request and receive judicial awards of attorneys fees to carry out its purposes of "providing assistance in the area of employment law to legal services attorneys and representing the poor in connection with employment related problems" (A-1013). Just as thousands of other organizations and companies, it receives federal funds by grant and contract. Yet it is no more the "United States" or a federal agency than the Hughes Aircraft Company, Grumman Aerospace Corporation, the Massachusetts Institute of Technology, the American Dental Association, the Black Economic Union of Greater Kansas City and the Booker T. Washington Foundation, which were among the organizations awarded federal contracts on a recent day.*

The JAC further claims, without any authority, that there is a clear Congressional purpose that litigation brought by the Government to enforce a law be borne by the public,

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* See Commerce Business Daily, United States Department of Commerce, March 23, 1976, for a complete list of the contracts over $25,000 awarded by the federal government on March 17, 1976, pp. 19-28.

not by private individuals (JAC Brief at 12). Yet the Supreme Court in Alyeska Pipeline Service Co. v. The Wilderness Society, supra, 421 U.S. at 262-63, n. 36, specifically noted that Congress' intent was not to restrict plaintiffs' recovery of attorneys fees in actions brought by legal services offices funded through the Legal Services Corporation, where under the circumstances other attorneys would be awarded such fees. The obvious conclusion is that where private individuals are being represented, it is not the government which is suing, but those individuals.

5. An Evidentiary Hearing Is Not Required in This Case

In its reply brief the Union argues that if this Court reverses the district court's reduction of attorneys fees, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) requires a remand for a full evidentiary hearing on the appropriate amount of the award. (Union Reply Brief at 15) Although the Union acknowledges that the district court did determine that the "affidavits submitted [by the Rios attorneys] are sufficiently detailed to meet the standards of the Court of Appeals in [Grinnell]" (A-1016), the Union argues that Grinnell requires a hearing in every case. This is not the holding of Grinnell, or the interpretation of this Court in cases which have followed it. In Grinnell, a case involving three consolidated, private antitrust, national class actions, the attorneys fee award was reversed and the issue remanded for a hearing

> "Because we feel that this fee was excessive and displayed too much reliance upon the contingent fee syndrome and because we feel that an evidentiary hearing was imperative in this case." (emphasis supplied)
>
> 495 F.2d at 468

The fees sought and already determined by the lower court to be appropriate if they "were to be paid by a profit-making

defendant" (A-1017), display none of the factors with which Grinnell was concerned and for which the hearing was held necessary. Indeed, the affidavits were submitted by counsel (A-969-86) and determined by the court in light of the standards established in Grinnell. The matter was determined on the basis of the experience of counsel, the hours worked, and tasks involved, and was determined by a court which was intimately familiar with the proceedings and the nature and quality of the services performed.* The fee which the district court determined to be otherwise appropriate was in no way excessive, averaging out to $52.29 per hour. (Compare awards in cases cited in Rios Brief at 25-26) The matter is thus comparable to that in Cranston v. Hardin, 504 F.2d 566, 578-79 (2d Cir. 1974), in which this Court, after Grinnell, upheld an award of attorneys fees in a case where an evidentiary hearing was not held, but where the award was based on detailed affidavits and the district court's familiarity with the work done by the attorneys in the case. Similar considerations formed the basis of the Ninth Circuit's affirmance of an attorneys fees award in a Title VII case, Kaplan v. Local 659, Stage Employees, 525 F.2d 1354, 1363 (9th Cir. 1975). The amount of the fee to which plaintiffs are entitled has been fully and correctly determined by the

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* Defendants' suggestion that the work in the Rios case only duplicated that in the government's action is simply frivolous and was properly rejected by the district court.

district court. The further evidentiary hearing sought by the Union is neither required or appropriate.

II. CONCLUSION

For the foregoing reasons, the District Court's order should be reversed insofar as it declined to award fees against MCA and JAC and awarded fees in an amount less than that requested. In all other respects that award should be affirmed.

Dated: New York, New York
April 30, 1976

Respectfully submitted,

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